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IN THE

Supreme Court of the United States

October Term, 1951

No.

WILLIAM J. PFISTER, J. F. RIDER, and WILLIAM HUEY,
Petitioners,

v.

COW GULCH OIL COMPANY, a Wyoming Corporation, and the ATLANTIC REFINING COMPANY, a Pennsylvania Corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

William J. Pfister, J. F. Rider and William Huey, petitioners herein, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 18, 1951; rehearing denied June 11, 1951.

OPINIONS BELOW

The judgment, findings of fact and conclusions of law of the United States District Court for the District of Wyoming (R. 37-46) are unreported. The opinion of the United States Court of Appeals for the Tenth Circuit (R. 185-191) is reported in 189 F. 2d 311.

JURISDICTION

This action was originated by William J. Pfister, a citizen of the State of Montana, in the United States District Court for the District of Wyoming, under 28 U.S.C. §1332. The petitioners, J. F. Rider and William Huey, were joined as parties plaintiff by stipulation and order of the District Court (R. 36), and, as their interests are derived through and under petitioner, William J. Pfister, no further reference need be made to them. The judgment of the United States Court of Appeals was entered on May 18, 1951. (R. 192.) Petitioners' petition for a rehearing was denied on June 11, 1951. (R. 205.) This Court, by its order, extended the time for filing this petition to and including October 10, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTION PRESENTED

Whether the United States Court of Appeals, sitting in a diversity of citizenship case, failed in its duty to follow the applicable local, substantive law in holding that it was not necessary to examine the question of notice to the party asserting the defense of laches of the rights of the party sought to be barred, and in holding that an estate of greater quantum than a tenancy by sufferance could be created by implication or operation of law after the expiration of a prior leasehold term.

STATUTES INVOLVED

The pertinent statutory provisions appear in their appropriate places in text.

STATEMENT

William J. Pfister, petitioner herein, as lessee under Oil and Gas lease No. 0-1390 issued by the State of Wyoming, owned a ten year interest in certain land situated in Niobrara County, Wyoming, more particularly described as, Section 36, Township 35, North, Range 66, West of the 6th P. M., Niobrara County, Wyoming. (R. 10, 52, 179.) This lease expired by its own terms on May 2, 1948, but, in accordance with Wyoming law, Pfister, as lessee, had a preferential right of renewal. (R. 52.)

During the early part of 1945, Pfister received some correspondence from Cow Gulch Oil Company (hereinafter referred to as "Cow Gulch") regarding the possibility of securing from him a sub-lease of this estate. (R. 53.) On August 2, 1945, Cow Gulch sent a representative up to see Pfister at his home in Billings, Montana, and on the same day Pfister sublet the aforesaid leasehold estate for a term of three years to Cow Gulch. (R. 53, 54, 104.) This was accomplished by the execution of two separate instruments[1] which were acknowledged by both parties. The first of these purported to be an assignment by Pfister to Cow Gulch of his leasehold interest, reserving to himself a 2½% overriding royalty. (R. 10.) The second instrument (hereinafter sometimes referred to as the "side agreement"), incorporating the first by reference, (R. 10-12), provided:

> 6. Cow Gulch may at any time, upon thirty (30) days' written notice to Pfister, surrender this lease, and in case Cow Gulch has not discovered oil upon said lease-

[1] The representative who negotiated the lease for Cow Gulch testified (R. 104):—Q. Can you explain to the Court why there were two separate writings at the same time? A. That was a State lease and it is generally the procedure to get the side agreement and an assignment, simultaneously side agreement [sic] in order not to clutter up the State records.

hold estate within three years from this date, it shall so surrender such lease, and in case of surrender, shall assign to Pfister, his heirs or assigns, the leasehold estate granted to it pursuant to this agreement.

It further provided:

7. If, at or after the expiration of the 10-year primary term of said State lease, Pfister or Cow Gulch or their heirs, successors or assigns, shall secure a renewal or extension of said lease . . . covering the above-described land, or any part thereof, the terms of this agreement . . . shall apply to and cover such renewal, extension or new lease, with the same force and effect as it now applies to the State lease above described. If such renewal, extension, or new lease is acquired by Cow Gulch or its successors or assigns, the holder thereof shall assign to Pfister the same overriding royalty therein . . .

This paragraph shall not apply to any renewal, extension, or new lease, if Cow Gulch shall have surrendered, or shall have become obligated to surrender, the above described State lease, as provided in paragraph 6 hereof.

The Cow Gulch representative, being a resident of Wyoming (R. 103), offered to and did undertake to record the aforesaid agreement at the office of the County Clerk of Niobrara County, Wyoming, on August 25, 1945. (R. 54, 105, 109, 179.) Through an error in recordation, the County Clerk omitted the acknowledgments from the record book (R. 178); but the abstract book showed that the agreement had been duly acknowledged. (R. 160.)

During the month of March 1948 (R. 92), Cow Gulch acting through the same representative who had secured the lease and side agreement from Pfister (R. 108), entered into negotiations with the Atlantic Refining Company (hereinafter referred to as "Atlantic") whereby the latter was to acquire certain leasehold interests of Cow Gulch. (R. 84, 85.) Among these was the State oil and gas lease here in issue. (R. 85.) But Atlantic would not deal for it because

it was held by someone else.[2] (R. 84.) Cow Gulch, however, informed Atlantic that it had preferential rights in the lease and would get a renewal on the expiration of the original term. (R. 159, 177, 178.) Apparently at no time during these negotiations did Cow Gulch disclose to Atlantic the fact of the existence of the side agreement between itself and Pfister. Atlantic was, however, told that Pfister had 2½% overriding royalty interest in the original State oil and gas lease and that he might have some interest in any renewal. (R. 93.) Without communicating with Pfister, searching the records, or investigating further, Atlantic agreed to take the lease under these circumstances, assuming so far as it knew at least the calculated risk of possibly having to pay Pfister a 2½% override. (R. 93, 94.)

On May 2, 1948, the original State lease to Pfister expired, and, under the terms of the side agreement, Cow Gulch obtained a renewal for another ten year term from the state of Wyoming. (R. 159, 160.) But on August 2, 1948, three years from the date of the execution of the side agreement, the term of the sublease from Pfister to Cow Gulch expired for failure of Cow Gulch to discover oil on the land.

Notwithstanding this, only 28 days later on August 30, 1948 (R. 85), pursuant to its prior negotiations with Atlantic and in direct violation of its agreement with Pfister, Cow Gulch assigned to Atlantic the aforesaid leasehold estate. (R. 180.) Pfister's interests, including his 2½% override, were completely ignored in this assignment (R. 93, 96), and neither party attempted to get either Pfister's permission or to notify him of the negotiations or of the assignment. (R. 93, 96.)

Shortly thereafter, in December, 1948, well before any drilling operations were started, Atlantic secured an abstract of title to the leasehold which contained the terms of the side agreement between Pfister and Cow Gulch. (R. 95, 179.) Still in complete disregard of Pfister's rights, and

[2] It was held, as Atlantic knew or should have known, by William J. Pfister.

without attempting in any way to communicate with Pfister, Atlantic commenced drilling operations about May 20, 1949. (R. 139.)

It was not, until some time towards the end of May, 1949, when he received a letter at his home in Montana written by one Al Rundquist informing him that Cow Gulch had acquired a renewal of the lease, had assigned it to Atlantic, and that Atlantic was commencing operations on his land, that Pfister had any notice at all which would indicate that his rights were being invaded. (R. 55, 160, 161.)

Shortly thereafter, Pfister who at the time was unable to locate his copy of the side agreement (R. 55) made a special trip to the home office of Cow Gulch at Denver, Colorado, for the purpose of securing a copy to refresh his mind on its forgotten terms. (R. 55, 56.) Arriving on Saturday, July 16, 1949, Pfister telephoned Cow Gulch's executive vice-president, Clio L. Kem, at his home, told him that he had lost his papers and asked to see Cow Gulch's records on the transaction. (R. 111.) Kem agreed to go to the office to show Pfister the documents in which he was interested. Kem, however, was unable to locate the Pfister file, though he did produce a letter to the effect that Pfister's interest in the overriding royalty was recognized, and Pfister appears to have made some vague inquiries regarding the protection of his royalty interest. (R. 55, 74, 112, 115.)

Accepting Kem's promise to mail him on Monday a copy of this letter (R. 112), and believing that a copy of the side agreement would also be forthcoming (R. 56), Pfister returned to his home in Billings, Montana. (R. 56, 57.)

But on Monday morning, instead of doing as promised, Kem communicated with an official of Atlantic and told him of Pfister's visit. (R. 113.) Apparently as a result of this conversation, neither Atlantic nor Cow Gulch made any effort to get in touch with Pfister (R. 57, 112), and Atlantic continued to drill on Pfister's land.

In the meantime Pfister, who, while confined to his home with a diabetes attack (R. 56) had been waiting to hear from Cow Gulch, received a telegram from Rundquist on August 12, 1949, informing him that Atlantic had struck oil on his land. (R. 57, 162.) He thereupon made a further search of his papers and found his copy of the side agreement. (R. 57.) Thereafter, on August 16, 1949, Pfister wrote to Cow Gulch, requesting an assignment of a 2½% overriding royalty interest. Cow Gulch, however, ignored this letter. And, when Pfister called later in the month to ascertain their disposition in the matter, he was coldly told to look to Atlantic for relief. (R. 79, 113, 164.) Notwithstanding this treatment, Pfister caused a letter to be written to Atlantic on August 31, 1949, explaining the situation and making the same request. (R. 164, 165.) As a result of this letter Atlantic entered into negotiations with Pfister during the month of September, 1949, looking toward a settlement of his claim. And on September 13, 1949, Atlantic submitted a proposed agreement (R. 169-175), which Pfister rejected on September 20, 1949, because it gave him even less than his minimum rights under the side agreement. (R. 165, 166.) Pfister still left the door open for further negotiations; but when he failed to hear from Atlantic by the 5th of October, 1949, he caused demand to be made on it for return of his leasehold interest. (R. 79.)

On October 13, 1949, only 23 days after he had rejected Atlantic's offer of settlement of his claim, Pfister commenced this action against Cow Gulch and Atlantic to compel them to reassign to him the lease to his leasehold estate, to enjoin Atlantic from further exploiting on his land, and to get an accounting of the oil already taken therefrom. (R. 10.)

The district court ruled in favor of the defendants (R. 37-46), and the United States Court of Appeals for the Tenth Circuit, without citing or relying on a single Wyoming case, affirmed the judgment of the lower court on the ground that,

irrespective of any notice to Atlantic, Pfister was barred by laches and had waived his rights. (R. 185-191.)

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred in failing to apply the applicable local case and statutory law:

1) By refusing, contrary to Wyoming case law, after concluding that Pfister was barred by laches, to examine the question of notice to or knowledge of Atlantic concerning Pfister's rights, and

2) In creating, by implication or operation of law, in direct contravention of the statutory mandate of the Wyoming legislature, an estate of a greater quantum than a tenancy by sufferance.

REASONS FOR GRANTING THE WRIT

I

In cases where the jurisdiction of a federal court is predicated upon diversity of citizenship, 28 U.S.C. §1332, the court is obligated under the doctrine of *Erie Ry Co.* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188, in reaching its decision, to apply the substantive law of the state in which the action is brought. This doctrine applies as well to the substantive principles of equity as to law, *Guaranty Trust Co.* v. *York*, 326, U. S. 99, 89 L. ed. 2079. The lower court failed completely in this respect in the following particulars.

A. The decision of the court below in refusing to examine the question of notice to Atlantic is in direct conflict not only with the controlling decisions of the highest court in Wyoming regarding the defense of laches, estoppel and/or waiver but also with the applicable general law on the subject.

1. LACHES

The court, in determining that Pfister was guilty of laches, decided that it was not necessary to go into the question of notice to Atlantic.

However, in Wyoming the defense of laches is available only when the party asserting it has acted in respect to the subject matter in good faith.

> " 'It is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.' " *Anderson* v. *Wyoming Development Co.*, 60 Wyo. 417, 154 P. 2d 318, 346, quoting with approval the language in *Halstead* v. *Grinman*, 152 U. S. 413, 38 L. ed. 495.[3]

And:

> ". . . [W]hen a suit is brought within the time fixed by the analogous statute of limitations, the burden is upon the defendants to show that extraordinary circumstances exist which require the application of the doctrine of laches in order to secure a just result. * * *" *Wyoming-Indiana Oil & Gas Co.* v. *Weston*, 43 Wyo. 526, 7 P. 2d 206, 212-213.

At the very heart of the question of good faith is the proposition that knowledge of or notice to the party asserting the defense of laches of the prior interest or equity in the party sought to be barred is strong evidence of bad faith.[4] In *Casper National Bank, et al.* v. *Swanson, et al.*, 42 Wyo. 113, 291 Pac. 812, 816, it was said:

> " 'If anything appears in such deed sufficient to put a prudent man on inquiry, which if prosecuted with ordinary diligence would lead to actual notice of some right or title in conflict with that he is about to purchase, it is his duty to make inquiry, and if he does not make it, *he is guilty of bad faith*, or negligence, and the law

[3] See also, 2 Pomeroy, Equity Jurisprudence, (5th Ed., 1941) §419d.

[4] 2 *Id.*, at §591. "This general doctrine was formulated by Lord Hardwicke in a celebrated case in the following emphatic terms: 'The ground of it is plainly this: that the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud and *dolus malus* itself; for he knew the first purchaser had the clear right of the estate, and after knowing that, he takes away the right of another person by getting the legal estate . . .' "

> will charge him with actual notice he would have received had he made it.'" [Emphasis added.] [5]

The result of notice is that, as between competing equities in the same subject matter, the one who acquires the subsequent interest with notice of the earlier equity in favor of another person will hold his acquisition subject and subordinate to such outstanding interest. With reference to "this most just rule" [6] the Supreme Court of Wyoming said in *Frank* v. *Stratford-Handcock*, 13 Wyo. 37, 77 Pac. 134, 136:

> "A purchaser of real property, with notice of a prior contract to convey the same to another, takes subject to the equitable rights of the original contractor to a completion of his bargain, and may be compelled in equity to perform the contract of his vendor . . ." [7]

The lower court should have determined whether or not Atlantic had notice or knowledge of Pfister's prior equities or interests in the subject leasehold estate.[8] The entire

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[5] To the same effect, 2 Pomeroy, *op. cit., supra*, at §603.

[6] 2 *Id.*, at §688-3.

[7] *Merrill* v. *Rocky Mountain Cattle Co.*, 26 Wyo. 219, 181 Pac. 964, does not require a different result. The court there found that the agreement under which the plaintiffs claimed did not contemplate the conveyance to them of the particular land in issue. This land the court ruled belonged absolutely to the defendant. The oil company which leased the premises from the defendant knew of this agreement. Consequently it knew that the plaintiffs had no right to the land when the lease was executed.

Moreover, the court's *dictum* in that case regarding the plaintiffs' laches is inapplicable here. There the speculative value of the property had risen greatly in the two-year period between the time of the execution of the agreement and the date provided for the defendant's performance. The plaintiffs knew this. Accordingly it became imperative for them to act immediately so as not to leave the muniments of title in the hands of the defendant to deal with as though he were the actual owner a day longer than the contract required.

[8] "If, at the time when he acted, such party had knowledge of the truth, or had the means by which, with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying

transaction between Cow Gulch and Atlantic, wherein the latter accepted assignment of the lease from the former within 28 days from the date when the breach occurred by failure to strike oil without in any way attempting to communicate with Pfister either to get his permission or ascertain his position with respect to his rights, is a clear indication of the utmost bad faith if Atlantic had notice or knowledge.[9]

In Wyoming it is also the law that:

> " 'Laches cannot be imputed to a party justifiably ignorant of the facts creating his cause of action . . . [The defendant must prove] . . . that the plaintiff has such knowledge requisite under general principles of equity as to hold him estopped.' " [10]

And, generally speaking, "No lapse of time bars one's right to property. It is only in case his right has been invaded that he can be barred of his right thereto."[11] Where a person has a recorded interest in real property he is under no duty to act to protect it until he is put on notice that his interest is being invaded.

In the instant case, therefore, Pfister was under no duty to anyone to act to protect his recorded interest in the leasehold until he received notice that someone was acting in a manner antagonistic to his rights therein. He did not receive such notice until sometime after May 22, 1949. Up to that time he was justifiably ignorant of the facts creating his cause of action. Laches could not, therefore, be imputed to him under Wyoming law.

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upon the representation or concealment. If, therefore, at the time of the representation the party to whom it was made was ignorant of the real facts, but before he acted upon it the statement was contradicted by its author, or he became informed of the truth, he cannot claim estoppel. 3 Pomeroy, *op. cit., supra,* at §810.

[9] See footnote 4, *supra.*

[10] *Wyoming-Indiana Oil & Gas Co.* v. *Weston,* 43 Wyo. 526, 7 P. 2d 206, 212-213.

[11] *Morse* v. *Smythe, et al.,* (D. C. E. D., Ky.) 255 Fed. 281, 284.

Moreover, even thereafter, Pfister was under no particular duty to act, because in Wyoming the defense of laches depends on more than a showing of mere delay. It must be a "delay in enforcing one's rights which works a disadvantage to another; that is in the nature of an equitable estoppel." *Anderson* v. *Wyoming Development Co., supra*, 154 P. 2d, at 345. "So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law . . ." [12]

Thus, even if Pfister could be guilty of failure to act, it could not be a basis for applying the doctrine of laches. It can hardly be said that his delay was the causative factor in any disadvantage to Atlantic. Atlantic cannot be heard to say that it altered its position because Pfister failed to act. Pfister's delay was no motivating factor in Atlantic's accepting assignment of the leasehold estate only 28 days after August 2, 1948, when Cow Gulch became obligated to assign it back to Pfister. At that time both Cow Gulch and Atlantic either had or should have had full knowledge [13] of Pfister's right to the assignment. Both knew that Pfister could not possibly know of their deal; but neither of them made the slightest attempt to inform him of it or to get his permission. It is significant to note, moreover, that,

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[12] 2 Pomeroy, *op. cit., supra*, at §419d.

[13] "If it can be shown that the party has in any way, from any person or source, by any means or method, for any purpose, although not in pursuance of the rules which regulate the giving of notice, obtained or derived actual and full knowledge of the kind above described [including knowledge inferred from facts sufficient to put a prudent man upon inquiry, §597], concerning the prior fact, interest, claim, or right,—that is, a knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired in the transaction or dealing in which he is engaged —then the same results must follow from the knowledge so obtained which would follow from an actual notice communicated in the manner required by the rules governing notice; in other words, the conscience of the party having the knowledge is affected by it in the same manner and to the same extent as it would be affected by an actual notice." 2 Pomeroy, *op. cit., supra*, at §603. [Square Brackets Ours.]

though they discussed Pfister's royalty interest, they made no provision for it in the assignment. Atlantic simply agreed to assume liability if claim was made. But, in order to further assure that no claim would be made, they concealed the fact of their transaction from Pfister. Certainly this alone should militate heavily against, if not completely defeat, the asserted defense of laches.[14] Nor should Atlantic be heard to say that Pfister's delay was the inducement to its commencing drilling operations. At that time Pfister still did not know of the assignment to Atlantic. So long as Atlantic and Cow Gulch were able to keep him in the dark, he never would have known. Both of them had full knowledge of Pfister's rights. But neither of them ever in any way attempted to communicate with him. It was Pfister who finally called on Cow Gulch, and even after that he was ignored. Cow Gulch and Atlantic failed to inform him of the assignment. They failed to inform him of the commencement of the drilling operations. And they failed to inform him that oil had been struck. These breaches of duty characterize their activities as manifest efforts to conceal the facts from Pfister, and they can only be said to have acted with the utmost bad faith. They certainly cannot be said to have relied on any failure on the part of Pfister to act. So far as Pfister's delay is concerned neither Cow Gulch nor Atlantic changed their condition as a result thereof. They changed their position, if at all, as a result of their own conscious wrongdoing.

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[14] In *Russell* v. *Republic Production Co.*, (C.C.A. 5, 1940) 112 F. 2d 663, 667, the defendant, while an officer of the plaintiff oil company had acquired in the fall of 1935 certain oil interests in his own right but in an area where the plaintiff was also purchasing without informing the plaintiff. At that time, by virtue of dry holes having been drilled thereon the interest seemed worthless. Oil was struck on August 2, 1935, after defendant had severed relations with the plaintiff. On August 5, 1936, defendant recorded his interests. It was inferrable that he intended to conceal his interests from the plaintiff. The plaintiff filed its bill in equity on September 17, 1936. As to the application of the doctrine of laches to the plaintiff's failure to act sooner, the court held that concealment is a factor which weighs heavily against the claim of laches.

As has already been pointed out, *Anderson* v. *Wyoming Development Co., supra,* the Wyoming Supreme Court has said that laches is an equitable defense, controlled by equitable considerations, and the lapse of time must be so great, and the relation of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them. The equitable considerations in this case clearly indicate that it would be inequitable if the plaintiff were not permitted to assert his title to this leasehold estate.

2. ESTOPPEL

The court below also seems to have said that Pfister's silence constituted an estoppel to or a waiver of the right which he sought to enforce. Enunciated as the considerations controlling in this conclusion were: a) silence under such circumstances when, according to the ordinary experience and habits of men, one would naturally speak if he did not consent, and b) acquiescence for an unreasonable length of time with knowledge of the relevant facts.

"Acquiescence consisting of mere silence may also operate as a true estoppel in equity to preclude a party from asserting legal title and rights of property . . . A most important application includes all cases where an owner of property, A, stands by and knowingly permits another person, B, to deal with the property as though it were his . . . as by expending money on it, making improvements, erecting buildings, and the like . . .

"Of course it is essential that the one making the expenditures should have been acting in ignorance of the title and in the supposition that he was rightful in his dealing."[15]

Obviously, therefore, in the instant case, Pfister could never have been estopped by his silence if Atlantic had notice or knowledge of his rights to the leasehold.

Moreover, it is the rule in Wyoming that where estoppel is sought as a bar to an assertion of a right to legal title of

[15] 3 Pomeroy, *op. cit., supra,* at §818.

land, the party against whom the bar is claimed must be shown to have been guilty of actual or constructive fraud. *Ford* v. *Libby,* 22 Wyo. 464, 143 Pac. 1190, 1193. And even in such a case it must be shown that the party asserting the defense in good faith relied on the conduct. *Vogel* v. *Shaw,* 42 Wyo. 333, 294 Pac. 687. Consequently, "If at the time when he acted such party had knowledge of the truth, or had means by which with reasonable diligence he could acquire the knowledge so that it would be negligence on his part to remain ignorant by not using those means, he cannot claim to have been misled by relying on the misrepresentation or concealment. If, therefore, at the time of the representation the party to whom it was made was ignorant of the real facts, but before he acted upon it the statement was contradicted by its author, or he became informed of the truth, he cannot claim estoppel." [16]

The decisive feature in the cases where the defense has been allowed has been that the property which is the subject matter of the litigation has greatly risen in value by virtue of the defendant's *good faith* expenditures since the complainant's cause of action accrued. But, as has already been shown, knowledge of or notice to the party asserting the defense of the plaintiff's prior equities destroys his *bona fides.* If the good faith requirement were to be omitted so that notice to or knowledge of the party asserting the defense were immaterial, the injury to the defendant could only consist in his uncertainty as to whether or not the person with the prior equitable title or interest will bring suit. The bases of such a doctrine could not be founded on any unfairness in the plaintiff's conduct. Such a doctrine would practically amount to saying that if the defendant's wrong has turned out to be an enormously profitable one to him, that would afford a reason, alone or in conjunction with others, why he should be protected in

[16] 3 *Id.,* at §810.

his profit by a court of equity; and the greater the profit the stronger the protection. The fact that the plaintiff may have innocently delayed for a short time would be, in this view, conduct more inequitable than any of which the defendant could possibly have been guilty, and would excuse the court from investigating the defendant's wrong.[17] As illustrated by the instant case the delay could be far less than the most stringent statute of limitation. Obviously such a result should not and cannot be permitted. It would be in direct conflict with the Wyoming Supreme Court's adjudication that the defense must be predicated as well upon equitable considerations.[18] The only conceivable consideration which might support such a rule would be one of policy, rather than of equity, against the disturbance of possessory titles however acquired. Policy is a question for the legislature not for the courts, certainly not for federal courts sitting as state courts in diversity cases.

The result of the decision of the lower court in the instant case, therefore, is not only inequitable under the principles as enunciated by the Wyoming courts, but it is also opposed to the letter of the statute of frauds.[19] It was for this reason that the Wyoming Supreme Court has laid down the requirement that before a person can be precluded from showing his title or interest in land, even where the adverse party has made improvements and increased the value thereof, it must be shown that the person attempting to assert his prior interest is guilty of either actual or constructive fraud. *Ford* v. *Libby, supra.* Thus it is clear that, had the court below examined the question of notice to or knowledge of Atlantic and had it found that

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[17] 4 Pomeroy, Equity Jurisprudence, (4th Ed.) §1444, and footnote 73.

[18] *Anderson* v. *Wyoming Development Co.*, 60 Wyo. 417, 154 P. 2d 318, 346.

[19] Wyoming Compiled Statutes, Annotated, (1945 Ed.) §5-101; *cf.* 3 Pomeroy, *op. cit., supra,* at § 807.

Atlantic had notice or knowledge, Atlantic not only would but should have been barred from asserting the defense of estoppel against Pfister on acconut of his silence which it had induced. This Court should grant certiorari to correct this error.

3. WAIVER

"But to constitute waiver otherwise than by express agreement there must be unequivocal acts or conduct by the vendor evincing an intent to waive. Mere silence or delay is not sufficient to establish a waiver, although silence on one side and conduct *in good faith relying thereon* on the other, whereby the other is placed in such a situation that he will be greatly damaged if the apparent attitude of his conditional grantor be changed, will bind the grantor as a waiver of the benefit of the condition."[20]

Once again we see that the right to assert the defense must be predicated upon a showing of good faith reliance on the silence of the owner of the title to the property by the party claiming the waiver. And it is now sufficiently established by what has already been said that if the party asserting the defense had knowledge of the rights or interests of the person against whom the defense is claimed, he cannot be said to have relied on the silence in good faith.

It must be conceded, however, even where the party asserting the defense has full knowledge of the adverse rights or interests of the other party, he may still claim the benefit of a waiver where the other party has expressly agreed to waive his rights, or has by some unequivocal act or conduct evinced an intent to waive.

It is too clear of record to warrant argument that Pfister never waived his rights by any express agreement. It is equally clear that nothing he said to others regarding his rights in the leasehold estate, not relayed to the respondents or in any way brought to their attention, could constitute a

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[20] 2 Pomeroy, *op. cit., supra*, at § 451 [Emphasis added.]

waiver. Neither Cow Gulch nor Atlantic could have relied on those statements. It is also equally clear that neither Cow Gulch nor Atlantic could have relied on anything he may have said after oil was struck to establish their right to drill and explore at a time prior thereto.

Consequently, the only possible instance in the entire record out of which the court below conceivably might have found a waiver by stretching the facts out of any semblance of proportion occurred when, on July 16, 1949, Pfister made a trip to the offices of Cow Gulch at Denver, Colorado. On that day, it will be remembered, Pfister called the executive vice-president of Cow Gulch and told him that, since he had lost his papers relating to the deal between himself and Cow Gulch, he would like to see the Cow Gulch files on the matter; but the only thing that the official was able to locate for him relating to the affair was a letter from Atlantic to Cow Gulch to the effect that Pfister's interests in the overriding royalty had been protected, a matter about which Pfister had appeared to express concern. Thus, even though Pfister under ordinary circumstances should have known what was in the side agreement, he did not because he had mislaid his papers; but he was making a good faith effort to secure copies. Cow Gulch should have known, if it did not, from the fact that he told it that he had lost his papers, that Pfister had no real idea what his specific rights to the lease-hold estate were. Cow Gulch should not, therefore, be permitted to rely on anything Pfister said regarding his rights since they knew or should have known that he had no idea what his rights were. To permit a waiver to be created under such circumstances would be the perpetration of a gross inequity. Moreover, it can hardly be said that Pfister's inquiry at that time regarding his royalty interest constituted conduct evincing an intent to waive, as required by Wyoming law. *Cf. Hanna State & Savings Bank* v. *Matson*, 53 Wyo. 1, 77 P. 2d 621, 625. Of course, subsequently, at a time when neither Cow Gulch nor Atlantic could have possibly claimed or based reliance thereon for

their drilling activities, Pfister did write two letters, one on the 16th of August, 1949, to Cow Gulch and one on the 31st of the same month, to Atlantic, seeking assignment to him of his overriding royalty interest. But since these letters were written after the fact, they were more in the nature of an offer of settlement of a valid and existing claim. Of course, when Atlantic ultimately came through with an offer of settlement, giving Pfister even less than his minimum rights under the side agreement, he rejected it; and within 15 days therefrom he made demand for his leasehold estate.

It is abundantly clear, therefore, that the lower court erred in its application both of the law of Wyoming and the general law when it concluded that it was unnecessary to determine whether or not Atlantic had notice of Pfister's interests in the State oil and gas lease here in issue.

B. The lower court erred in holding contrary to the mandate of the Wyoming Statutes, that Pfister was barred by laches, waiver and/or estoppel from asserting his right to possession of the leasehold estate.

The Wyoming Legislature has unequivocally stated:

> "... there shall not exist the relations of landlord and tenant, by implication or operation of law, except a tenancy by sufferance. Upon the expiration of a term created by a lease ... there shall be no implied renewal of the same for any period of time whatever ... by the tenant holding over ..."[21]

And:

> "No lease which shall have expired by its own terms shall again be renewed except by express contract in writing ... Nor shall any other tenancy than that by sufferance exist after the termination of the original lease, unless created as aforesaid, by express contract in writing."[22]

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[21] Wyoming Compiled Statutes, Annotated (1945 Ed.) §66-219; construed, *Lawer* v. *Mitts*, 33 Wyo. 249, 238 Pac. 654; *Hitshew* v. *Rossen*, 41 Wyo. 509, 287 Pac. 316.

[22] *Id.*, §66-220.

Since the relation of landlord and tenant cannot arise by operation or implication of law, except such as would be created by a tenancy by sufferance,[23] either at the expiration of the term of a lease or otherwise, it is too clear to warrant argument that estoppel, laches, or waiver cannot operate to create any other estate beyond the term of the original lease than one by sufferance.

The side agreement between Pfister and Cow Gulch created an estate in Cow Gulch which expired by its own term on August 2, 1948. Thereafter, Cow Gulch had nothing more to assign to Atlantic than a tenancy by sufferance which could be terminated at any time at Pfister's will. Atlantic took this estate with notice of Pfister's rights. Consequently the lower court erred in refusing Pfister possession and in creating in Atlantic, by operation of law, a greater estate than a tenancy by sufferance.

The court's error in this respect is predicated upon the fallacious conclusion that the term of tenure created by the side agreement had not expired.

This conclusion was reached in turn by an erroneous analysis of the applicable oil and gas law. In the law relative to the construction of lease agreements in this field two types of instruments are recognized: "or" leases and "unless" leases.[24]

Judge Phillips, author of the opinion below, distinguished these two types of leases in an earlier decision in the case of *Gloyd* v. *Midwest Refining Co.*, (C.C.A. 10, 1933) 62 F. 2d 483. There he said, page 485:

> "Under the 'or' lease the lessee is obligated either to drill a well or pay rental, and the failure to pay rental does not terminate the lease; and where the lessee makes default in the payment of rental the lessor may waive the default and recover such rental.

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[23] A tenancy by sufferance may be terminated at the will of the landlord without giving notice. *Welch* v. *Rice*, 61 Wyo. 511, 159 P. 2d 502. See also cases cited, footnote 21, *supra*.

[24] *Gloyd* v. *Midwest Refining Co.*, (C.C.A. 10, 1933) 62 F. 2d 483, 485; *McCrabb* v. *Moulton*, (C.C.A. 8, 1942) 124 F. 2d 689, 691.

"But under an 'unless' lease the lessee is not obligated either to commence a well or pay rental. Until a well has been drilled and oil or gas produced, such a lease is terminable at the will of the lessee, and where no well has been commenced *such a lease automatically terminates* upon the intentional failure of the lessee to pay the stipulated rental [if any] within the time provided in the lease." [Emphasis added; square brackets ours.]

The basic distinction between the two[25] is, therefore, that, in the "unless" lease, though the lessee is not obligated in any way to act, unless he performs the condition named in the lease on or before the specified date, he is automatically divested of the interest granted to him. In other words, he must perform the condition precedent before the estate granted can vest absolutely in him. Failure to perform the condition causes the estate to expire on its own limitation at an earlier date than had the condition been performed. On the other hand, in the "or" lease, the lessee is obligated to either pay or drill at his option; but failure to do either does not automatically terminate the term of the lease because the lessor has the option of either suing for the rent due or seeking a forfeiture of the estate for failure to perform the condition subsequent of drilling for oil.

When, therefore, under an "unless" lease, the lessee fails to perform the condition on or before the specified date, the limiting event has occurred, and the estate automatically terminates and reverts back to the lessor. The interests created by "unless" leases are said to be better classified as estates upon a special or common law limitation wherein the lessee's interest continues until the happening of the event upon which it terminates.[26] But, regardless of the nomenclature, the cause and effect are the same.

It was the lower court's opinion that the side agreement

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[25] 2 Summers, Oil and Gas, (Perm. Ed., 1938) §§337, 339, 452; 2 Tiffany, Real Property, (3rd Ed., 1939) §589.

[26] Summers, Oil and Gas, (Perm. Ed., 1938) §452, at p. 498; Hinkle, Fundamentals of Oil and Gas Law, 37 ABAJ 572-573 (Aug., 1951).

did not constitute an "unless" type of lease, because, after the term of Pfister's original State oil and gas lease had expired on May 2, 1948, and Cow Gulch had obtained in its own name a renewal for another ten year term, it became necessary for Cow Gulch to do something else after the terminating event occurred; to wit, assign the lease back to Pfister. But this argument must fail for the reason that it is predicated upon the fallacy that such an estate cannot terminate automatically when it is necessary for the lessee to do some further act, after the limiting event has occurred, in order to perfect legal title in the lessor. On the contrary, as we have seen, it is not the character of the act required of the lessee after the limiting event occurs to revest legal title in the lessor which is determinative;[27] rather it is the question of whether the lessee's failure to perform the condition named is a limiting event or merely the breach of a condition subsequent. And whether or not it is a limiting event in turn is determined by whether the lessee, after the occurrence thereof, is still obligated under the agreement to pay rent, if the lessor so desires,[28] or may be liable for damages for failing to drill,[29] or may be compelled to forfeit the estate.[30] If the lessor has no cause of action against the lessee for any of the foregoing, then the event named is a limiting event. The estate terminates automatically on its occurrence and must revert back to the lessor.

No doubt Judge Phillips felt that the law as stated in *McCrabb* v. *Moulton,* (C.C.A. 8, 1942) 124 F. 2d 689, would have been controlling as to Pfister's right of recovery if he had not also felt that it was "clearly distinguishable."

In the *McCrabb* case the lessee-plaintiff had assigned and sold his entire leasehold interest to one Moulton, the de-

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[27] *Cf. Witherspoon* v. *Green,* 274 S. W. 170 (Tex., 1925); noted in 27 Columbia Law Review 109 (1926); *McCrabb* v. *Moulton, supra,* footnote 24.

[28] 2 Summers, *op. cit., supra,* compare §338 with §339.

[29] *McCrabb v. Moulton, supra,* footnote 24; 2 Summers, *op. cit., supra,* at §335.

[30] 2 Summers, *op. cit., supra,* at §§333-336.

fendant. Moulton failed to drill on or before the specified date as provided in the agreement under which the lessee's interest passed. The lessee brought suit for damages for failure to drill. The court, holding this was an "unless" lease, said that Moulton was under no obligation to drill. His failure simply constituted a limiting event which automatically terminated the estate.

The so-called "clearly distinguishable" feature of that case upon which the court relied to deny Pfister recovery was found in the fact that Moulton, the assignee, had not obtained a new lease from his assignor's lessor as did Cow Gulch from the State of Wyoming.

But it is well settled that the assignment and sale of an entire leasehold interest creates no new estate. It merely transfers an existing estate into new hands.[31] The assignor parts with his entire interest in the property,[32] and the assignment creates a privity of estate between the head lessor and the assignee,[33] the latter being substituted for his assignor, the original lessee.[34] The original lessee-assignor, therefore, is removed completely from the chain of title, and, in law, the landlord and tenant relationship exists only between the head lessor and the assignee just as effectively as though the assignee had acquired a new lease in his own name; so that, regardless of whether or not the assignee has acquired a new lease in his own name from the head lessor, the formal mechanics of making an assignment back to his assignor are exactly the same in either case. Nor is there any difference in substance.

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[31] *City of Waterville* v. *Kelleher*, 127 Me. 32, 141 Atl. 70; *Saling* v. *Flesch*, 85 Mont. 106, 277 Pac. 612; 32 Am. Jur., *Landlord and Tenant*, §314.

[32] *City of Waterville* v. *Kelleher*, *supra*, footnote 31; *Weigle* v. *Rogers*, 202 Mo. App. 520, 213 S. W. 501; *McKinley Realty & Const. Co.* v. *Rosenblum*, 149 Misc. 730, 268 N.Y.S. 67, *Marathon Oil Co.* v. *Lambert*, 103 S. W. 2d 176, 181 (Tex. Civ. App.); 32 Am. Jur., *Landlord and Tenant*, §313.

[33] *Pan American Petroleum Corp.* v. *Parker*, 230 Ala. 178, 160 So. 220, 223.

[34] *Weinstraub* v. *Weingart*, 98 Cal. App. 690, 277 Pac. 752, 756.

Thus it is clear that the *McCrabb* case, *supra,* is not distinguishable on the grounds claimed, and it should, therefore, have controlled in the instant case, because the side agreement between Pfister and Cow Gulch can only be construed as an "unless" lease.

The controlling language of the agreement is found in clauses 6 and 7 thereof as follows:

> 6. Cow Gulch may at any time, upon thirty (30) days' written notice to Pfister, surrender this lease, and in case Cow Gulch has not discovered oil upon said leasehold estate within three years from this date, it shall so surrender such lease, and in case of surrender, shall assign to Pfister, his heirs or assigns, the leasehold estate granted to it pursuant to this agreement.
>
> 7. If, at or after the expiration of the 10-year primary term of said State lease, Pfister or Cow Gulch or their heirs, successors or assigns, shall secure a renewal or extension of said lease . . . covering the above-described land, or any part thereof, the terms of this agreement . . . shall apply to and cover such renewal, extension or new lease, with the same force and effect as it now applies to the State lease above described. If such renewal, extension, or new lease is acquired by Cow Gulch or its successors or assigns, the holder thereof shall assign to Pfister the same overriding royalty therein . . .
>
> This paragraph shall not apply to any renewal, extension, or new lease, if Cow Gulch shall have surrendered, or shall have become obligated to surrender, the above described State lease, as provided in paragraph 6 hereof.

Under the 6th clause it was provided that, unless Cow Gulch discovered oil within 3 years from August 2, 1945, the date of the agreement, the lease was to be surrendered, and Cow Gulch then became obligated to assign it back to Pfister, just as Moulton became obligated in the *McCrabb* case, *supra.* It is to be noted that Cow Gulch was not obligated to drill or discover oil or to pay royalties. It was only in the event oil was discovered that Cow Gulch became

obligated to do anything, to wit, pay an overriding royalty to Pfister. Moreover, there is no provision to be found anywhere in the agreement under which Cow Gulch was given the option of either discovering oil or paying a royalty or rent. The payment of the royalty was contingent upon the discovery of oil within the 3 year period. Pfister could not sue for rent, royalties, failure to drill, or breach of contract.

Cow Gulch, having failed to discover oil on or before August 2, 1948, failed to perform the condition precedent. The limiting event occurred. The lease was automatically terminated.

Clause 7 does not in any way alter this result. The first paragraph thereof only relates to the situation where Cow Gulch acquired in its own name a renewal of the State oil and gas lease either before or after it discovered oil within the 3 year term. The last paragraph of the clause makes this abundantly clear, since it provides that clause 7 is inapplicable where Cow Gulch has become obligated to surrender up the lease for failure to discover oil on or before August 2, 1948.

There can be no doubt, therefore, under the authorities, that the terms of the side agreement caused an automatic termination of Cow Gulch's interest in the leasehold estate upon the occurrence of the limiting event of failure to discover oil on or before August 2, 1948. Thus, under the statutory law of Wyoming, Cow Gulch acquired no greater interest than a tenancy by sufferance by its holding over after the expiration of the term, and Pfister had the right to terminate this relationship at any time. Consequently the lower court erred in creating an estate greater than a tenancy by sufferance in Atlantic by operation of law. For this reason the petition should be granted so as to make the decision below comply with the applicable local substantive law.[35]

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[35] *Erie Ry. Co.* v. *Tompkins*, 304 U.S. 64, 82 L.ed. 1188.

II

During the last 5 years in Wyoming, the oil and gas industry has grown tremendously. In the fiscal year ending June 30, 1945, there were only 2,298 separate federal oil and gas leases in force on Wyoming land.[36] But for the fiscal year of 1951, 14,616 federal oil and gas leases covering 11,117,610 acres were in force on Wyoming land alone.[37] In the calendar year of 1945 only 491 Wyoming state oil and gas leases were issued. In 1950, however, the State issued 1,128 such leases, covering 492,625 acres.

With the loss of the crucial Iranian oil fields, no one today can minimize the importance of the effective development of these Wyoming reserves. But their effective development can and will be hampered by the impact of the lower court's decision. It flies directly in the face of Wyoming public policy as stated in its recording acts, its laws regarding the creation of tenancies by implication or operation of law, and its statute of frauds. It is unwarranted and unauthorized judicial legislation at its worst. Its result is to cast serious doubts upon the security of all recorded interests in land by awarding title to the trespasser when his wrongdoing is successful. And the bigger his success, the greater are the fruits of his wrong.

But the security of recorded titles is an absolute necessity to the effective development of these oil reserves. The risks are great and the investments large. In this vast, remote and largely unpopulated territory the owner of the recorded interest cannot always be in actual physical possession. Consequently, absolute reliance must be had upon the effectiveness of the recordation statutes. If the contrary result required by the decision below is permitted to prevail, honest and enterprising capital will be forced

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[36] Report of the Commissioner of the General Land Office (1945), Statistical Appendix.

[37] Tentative Report of the Director of the Bureau of Land Management (1951), Statistical Appendix.

to retire. The effect will be incalculable. The sensible, workable state registry acts, which have been successful for years in protecting interests in land will be ignored. Likewise, the Wyoming statutes prohibiting the creation of greater estates than tenancies by sufferance after the end of a term, will go for naught. As it now stands, it is indeed a hard case which makes such bad law as to imperil the effective development of the oil and gas industry in Wyoming.

CONCLUSION

For the foregoing reasons this petition should be granted and the writ of certiorari be issued to review the judgment of the court below.

Respectfully submitted,

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Counsel for the Petitioners

Office-Supreme Court, U.S.
FILED
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CHARLES ELMORE CROPLEY

No. 380

IN THE

Supreme Court of the United States

October Term, 1951

WILLIAM J. PFISTER, J. F. RIDER and WILLIAM HUEY,
Petitioners,
vs.
COW GULCH OIL COMPANY, a Wyoming corporation, and THE ATLANTIC REFINING COMPANY, a Pennsylvania corporation,
Respondents.

RESPONDENTS' BRIEF OPPOSING ISSUANCE OF WRIT OF CERTIORARI

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Statement of the Case

The statement of the case contained in petitioners' brief supporting their petition is incomplete, and we shall supplement the same.

For convenience, reference will be made to respondent Cow Gulch Oil Company as "Cow Gulch," to respondent The Atlantic Refining Company as "Atlantic," and to petitioner William J. Pfister as "Pfister."

In petitioners' brief no mention is made of the fact that Atlantic expended $143,512.39 in the drilling of two wells, and an additional $24,813.73 in the completion of one as a producer, making a total of $168,326.12 (R. 141, 142, 182). Since the dry hole was drilled about the same time as the producing well (R. 140) and the latter was completed about September 1, 1949 (R. 139), the expenditure of $143,512.39 was made prior to that date. In addition to the drilling and completion costs, Atlantic expended in operating the producing well for eight months $7,475.12 (R. 143).

From September 1, 1949, to March 31, 1950, the production from the producing well was 26,758 barrels of oil of the value of $69,001.00 (R. 138, 182).

The lease under which Atlantic operated was issued to Cow Gulch May 2, 1948 (R. 13). The original lease was issued to Pfister May 2, 1938, with term of ten years, expiring May 2, 1948 (R. 52).

Pfister assigned the original lease to Cow Gulch August 2, 1945, reserving 2½% overriding royalty for the benefit of himself and J. F. Rider and J. W. Allsup. This is an assignment and not a "sub-lease" as may clearly be seen from the verbatim copy thereof at pages 24 and 25 of the Record, the conveying language being that Pfister, as lessee, does "hereby sell, assign, transfer and set over unto Cow Gulch Oil Company, a Wyoming corporation, a certain oil and gas lease described as follows: * * *."

In the collateral agreement between Pfister and Cow Gulch of August 2, 1945 (R. 10-12) reference is made in paragraph 2 to the execution simultaneously therewith of "an assignment" of the lease, subject to overriding royalty of 2½%. In paragraph 6 it is provided that if Cow Gulch has not discovered oil within three years from date "it shall surrender such lease, and in case of surrender, shall assign to Pfister, his heirs or assigns, the leasehold estate granted to it pursuant to this agreement."

POOR

Since the original lease was issued May 2, 1938, with term of ten years, expiring May 2, 1948, the three year discovery period did not expire until three months after expiration of the lease, by its own terms. Anticipating this situation, the parties agreed in paragraph 7 that after expiration of the ten year term of the original lease either Pfister or Cow Gulch might obtain a renewal, and if Cow Gulch obtained a renewal it should assign to Pfister the same overriding royalty as was reserved by Pfister in the assignment to Cow Gulch of the original lease, and if Pfister obtained the renewal lease he should assign the same to Cow Gulch, reserving the same overriding royalty of 2½%. Pfister did not apply for a renewal lease, but Cow Gulch did, and the new lease was issued May 2, 1948 (R. 13). The new lease was assigned by Cow Gulch to Atlantic August 30, 1948, with reservation of 2½% overriding royalty (R. 26). This assignment was recorded in the office of the County Clerk of Niobrara County, Wyoming, March 24, 1949, and the lease was recorded in the same office, April 18, 1949, (R. 180). These recordings were made prior to the time Atlantic commenced drilling the first well, May 20, 1949 (R. 139).

The three year discovery period under the collateral agreement expired August 2, 1948, but Pfister took no action and did not demand from Cow Gulch an assignment of the lease. In July, 1948, prior to expiration of the three year discovery period, he learned of the issuance of the new lease to Cow Gulch (R. 61). Cow Gulch did not surrender, Pfister made no demand upon Cow Gulch or upon Atlantic, and this notwithstanding the fact that he knew of the issuance of the new lease to Cow Gulch as early as July, 1948, and Cow Gulch's assignment to Atlantic was recorded in the office of the County Clerk of Niobrara County, March 24, 1949 (R. 180). What was disclosed by the public records as of the time of commencement of drilling by Atlantic, May 20, 1949, was the assignment of the original lease by Pfister to Cow Gulch, dated August 2, 1945, the imperfectly recorded side

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agreement of the same date, the new lease issued to Cow Gulch May 2, 1948, and recorded April 18, 1949, and the assignment thereof to Atlantic, recorded March 24, 1949. Nothing appeared of record showing any intention or attempt by Pfister to declare a forfeiture.

On May 22, 1949, two days after commencement of drilling operations by Atlantic, A. N. Rundquist, an associate of Pfister, who assisted him in obtaining the original lease in 1938 (R. 120) and to whom Pfister agreed to convey a 1/7 interest for services rendered (R. 52, 53), and whose 1/7 interest was recognized in the judgment of the Court herein entered (R. 45, 46), addressed a letter to Pfister at Billings, Montana, mailing the same at Lusk, Wyoming, in which he said:

> "The records show that Cow Gulch got a new lease on expiration of the old one and assigned to the Atlantic. According to your agreement with Cow Gulch, if they never surrendered back to you, your interests are o.k. There is no surrender of record and too, from a remark by Baca, all old interests are protected." (R. 161).

Pfister received this letter in the ordinary course of the mails (R. 55). He did not reply until July 6, 1949, when he wrote to Rundquist, saying:

> "I am glad to know they are going to put down another hole on our lease. As I understand our lease we are protected on any deal as long as the Cow Gulch keeps the lease." (R. 161, 162).

Thereafter, on July 16, 1949, Pfister went to Denver and saw Kem, Vice President of Cow Gulch, and wanted assurance that he would receive the overriding royalty (R. 111-112). Pfister had misplaced his copy of the contract and Mr. Kem was unaware of its existence since Mr. T. A. Pedley, who signed for Cow Gulch as President, left the company in the early part of 1946 and never returned, and George L. Kay, who signed as Secretary for Cow Gulch, died some

time in August, 1946. Mr. Kem had never seen the collateral agreement and did not know it existed until after Pfister's call upon him (R. 111-115).

In the negotiations for the purchase of the lease from Cow Gulch, Atlantic was represented by Castleberry and he never knew of the side agreement until about August 22, 1949 (R. 86). Pace, who also represented Atlantic along with Castleberry, first learned of the side agreement late in August, 1949 (R. 99). Atlantic received an abstract of title certified to November 8, 1948,, some time in December, 1948 (R. 159), but this was long subsequent to the assignment of the lease from Cow Gulch to Atlantic, August 30, 1948 (R. 26), and there is no evidence as to what was done with the abstract or that anyone connected with Atlantic made any examination thereof. Petitioners claim that Castleberry, representing Atlantic, admitted that he knew Pfister might have an interest in the lease (R. 94), but a reading of his testimony at pages 93 and 94 of the Record discloses that the interest to which he referred was a 2½% overriding royalty.

Petitioners state that Cow Gulch, acting through the same representative who secured the side agreement from Pfister (Petitioners' Brief, P. 4), entered into negotiations with Atlantic. A reading of the record (P. 108, 109) confirms the fact that such representative, Mr. Baca, opened up negotiations with Mr. Pace of Atlantic, but when asked the question "Did that pertain to this section of land that is involved in this suit, your negotiations with Atlantic, with Mr. Pace?" he answered, "No. I just set out the block to him and told him what acreage Cow Gulch had."

Pfister employed James M. Haughey, of the firm of Coleman, Jameson and Lamey, of Billings, Montana, and they addressed the letters of August 16 and 31, 1949, and September 20, 1949, (Defendants' Exhibits 6, 7 and 8, appearing at pages 162 to 166 of the Record), to Cow Gulch and Atlantic, in all of which

demand was made for an assignment to Pfister of an overriding royalty of 2½%. All were written after the producing well was brought in, August 8, 1949 (R. 139), and subsequent to August 12, 1949, when Rundquist notified Pfister of the discovery (R. 65), and when Pfister located his copy of the agreement among his papers (R. 73). Pfister's attorneys, through their client, were informed that the State would not permit overriding royalties in excess of 2½%, and consequently were in doubt as to the sufficiency of the assignment of 2½% overriding royalty to Pfister and his assigns (Defendants' Exhibit 14, R. 169-172) prepared by Atlantic and approved by Cow Gulch, and so notified Atlantic by their letter of September 20, 1949 (R. 165, 166). Before this letter was answered by Atlantic, and on October 5, 1949, Pfister, Rider and Huey, on the one had, and plaintiff Snyder, on the other, entered into an agreement whereby Pfister and his associates agreed to assign to Snyder a 25% interest in their rights in the lands involved in this suit above an overriding royalty of 5%, in consideration of Snyder's agreement at his sole expense to further their claims, investigate the records, and establish the facts, for the purpose of securing such rights as they might have (R. 26). Edwin Z. Snyder was a plaintiff in the trial court and one of the appellants in the Circuit Court of Appeals, but does not appear as a petitioner herein.

On the same day, October 5, 1949, Snyder called Pace, representative of Atlantic, on long distance at Dallas, Texas, and told him he knew how to deal with major oil companies, that Atlantic had made a slip-up, and demanded $100,000.00 cash, $400,000.00 to be paid out of oil, and 5% override (R. 100-101).

While no mention is made thereof in Petitioners' brief, the judgment of the trial court, affirmed by the Circuit Court, awarded to Pfister and his assigns the overriding royalty of 2½%, it being apportioned in accordance with the evidence in the case as follows:

J. W. Allsup.....	.36	of 1%	
J. F. Rider.....	.288	of 1%	
William Huey	.072	of 1%	
A. N. Rundquist.....	.36	of 1%	
William J. Pfister..	1.42	of 1%	(R. 46).

THE ARGUMENT

The Decision Conforms to the Decisions of the Supreme Court of Wyoming

The last sentence of the decision of the Circuit Court is:

> "We deem it unnecessary to determine whether the recording of the collateral agreement constituted *constructive* notice to Atlantic."

The only point undecided by the Circuit Court was as to constructive notice to Atlantic, but petitioners' argument proceeds on the theory that if it be assumed Atlantic had constructive notice from the recording of the side agreement, then Atlantic acted in bad faith in the development of the lease. Under the law in Wyoming and other jurisdictions, the conclusion does not follow, for the reason that under the terms of the side agreement there was no automatic termination of a lease but only a right to be exercised by Pfister to obtain an assignment of the lease to him in the event of lack of discovery during the three year period. As is accurately stated by the Circuit Court, "but neither the assignment nor the collateral agreement contained any provision for automatic termination of the assignment on the failure to discover oil within the stipulated period. Rather, the collateral agreement provided in such event for an assignment to Pfister. Only by an assignment could the rights of Atlantic in the new lease have become vested in Pfister." (189 Fed. 2d, 314).

The decision of the Court on this subject is in entire harmony with that of the Supreme Court of Wyoming in *Larsen Sheep Company vs. Sjogren*, 67 Wyo. 447, 226 Pac. 2d 177, decided January 2, 1951. In that case a lease, which was duly recorded in the County Clerk's office, contained a provision that if lessee should fail to perform any of the covenants and conditions therein, the lessor might without formal notice or demand, declare the term ended and re-enter

the premises. Breach of condition occurred. The Court held there was no automatic termination of the lease, saying:

> "In any event a breach of covenant or condition in a lease does not ipso facto terminate a lease, but some affirmative step must be taken—e.g. re-entry—in order to enforce the forfeiture. 51 C.J.S., Landlord and Tenant, Sec. 114, pp. 693, 696, 32 Am. Juris. 722. Such forfeiture may be waived and since it is not favored, slight circumstances will at times suffice to constitute a waiver." (P. 182).

The language in the lease in the above cited case is far more favorable to the construction contended for by petitioners herein than is that in the collateral agreement.

Since there was no automatic termination, constructive notice of the side agreement would have imparted only knowledge of its existence and would not have constituted any notice that Pfister had taken any action to acquire, or intended to acquire the lease.

Moreover, it is not the type of case that yields to the argument of automatic termination. The original lease was no longer in existence, and the new lease which was acquired by Atlantic was issued to Cow Gulch, and Pfister was never the lessee therein and never held the same as assignee. As said by the Circuit Court, it is too plain to require further exposition that under no theory of termination could the rights of Atlantic become vested in Pfister.

Clearly, the side agreement was not an "unless" lease, as argued by Petitioners. In fact, the relationship between Pfister and Cow Gulch was never at any time that of lessor and lessee and was only that of assignor and assignee until the termination of the original lease, May 2, 1948. Thereafter, Cow Gulch was the lessee, and it was specifically agreed that it should continue to be such, its only responsibility being the conveyance of the 2½% overriding royalty.

The parties to the side agreement clearly and unequivocally covenanted that if a new lease was obtained by Cow Gulch, the latter was not obligated to assign to Pfister, but should retain the lease, giving Pfister 2½% overriding royalty, subject only to Pfister's right to obtain an assignment of the lease in the event of failure of discovery within the time specified.

However, even under the provisions of "unless" leases, termination is not automatic. A leading case is *Transcontinental Oil Co. v. Spencer* (C.C.A. 5th) 6 Fed. 2d 866, wherein the lease provided that if a well was not commenced and prosecuted with due diligence, the lease would terminate unless the lessee paid delay rentals. In relation to lessee's failure to prosecute the drilling of the well with due diligence, the Court said:

> "But, even if lessee's delay in completing the well as a gas well after the disclosure that it would not produce oil constituted a failure to prosecute the work with due diligence, such default of the lessee did not itself terminate the lease, but merely gave the lessors a waivable option to cancel." (P. 868).

The Court went on to say that the mere occurrence of lessee's default did not put an end to its rights under the lease if lessor so conducted himself as to signify his consent to the lease remaining in effect, or to influence the lessee to change its position by proceeding with the work in reliance on the belief, so induced by the conduct of the lessor, that the lease remained in force.

In *Duntley v. Anderson* (C.C.A. 8th), 169 Fed. 391, the lease contained a provision that if a well was not drilled within twelve months, the lease should become absolutely null and void unless the lessees piped gas to the residence of the lessors. It was held that the forfeiture provision was waived by the lessors, the Court saying:

"The lessor had the undoubted right at the expiration of the 12 months to take advantage of this forfeiture clause for nonaction, if he desired to do so. It was a provision for his interest, and his benefit. He was not bound to insist upon it, but might do so if he wished. If he desired to insist upon it, he should have forbade the laying of pipe upon his land and refused to take the gas; but this he did not do." (P. 394).

The decision of the Supreme Court of Wyoming in Larsen vs. Sjogren, supra, 67 Wyo. 447, 226 Pac. 2d, 177, is in harmony with the view expressed in Transcontinental Oil Co. v. Spencer above quoted, to the effect that lessor has a waivable option to cancel.

Since there was no automatic termination, and in fact could be none which would have the effect of vesting title to the lease in Pfister, nothing appeared upon the public records at the time Atlantic received its assignment of the lease August 30, 1948, or at the time it commenced drilling, May 20, 1949, which disclosed any interest in the lease by Pfister except a waivable option to declare a forfeiture. The records affirmatively disclosed lack of action by Pfister. Due to absence of any action by Pfister, Atlantic was justified in believing that the lease was in full force and effect and would so continue.

When notified of the commencement of operations by Atlantic, Pfister clearly disclosed his reason for not taking any action to obtain an assignment of the lease, as he said in his letter to Rundquist:

"I am glad to know they are going to put down another hole on our lease. As I understand our lease, we are protected on any deal as long as Cow Gulch keeps the lease." (R. 161-162).

He was anxious not to exercise any claimed right of assignment as he wanted the lease drilled in order that he might obtain the overriding royalty.

The whole argument of petitioners proceeds on the erroneous theory that Atlantic, assuming that it

knew or should have known of the terms of the side agreement, then had knowledge that Pfister held the lease. All that Pfister had was a right to demand an assignment of the lease, which he might or might not exercise, as he chose, and which he elected not to invoke.

Petitioners cite a number of Wyoming cases which deal with the general principles of laches and equitable estoppel and, selecting certain pronouncements therefrom, urge that Atlantic proceeded with notice or knowledge and, if it did, acted in bad faith. These cases do not relate to factual situations similar to the instant case, and the entire argument goes awry because of the assumption of counsel that if it be assumed Atlantic knew of the side agreement, then the further assumption follows that Pfister owned the lease and not Cow Gulch at the time Atlantic received its assignment. Petitioners, however, give only footnote reference to the one Wyoming case involving oil and gas development and decided under similar principles as the case at bar. This is *Merrill v. Rocky Mountain Cattle Co.*, 26 Wyo. 219, 181 Pac. 964. That was a suit for specific performance of a contract for the sale of land, and before plaintiffs brought the action the value of the land had been greatly increased because of discovery of oil thereon. The Court held that plaintiffs were barred by laches, citing *Patterson v. Hewitt*, 195 U.S. 309, 49 L. Ed. 214, and *Twin Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L. Ed. 328. In holding plaintiffs barred from relief, the Court said:

> "Thus, with knowledge of the facts, the plaintiffs waited before asserting their right here claimed until the value of the land for oil purposes had been demonstrated by the defendant Phelps through his lease to said operating company, allowing their decision to insist upon what they now claim as their right to depend upon the success or failure of the drilling operations carried on at the expense of others. We think that a very prompt assertion of their alleged right was necessary to justify the exercise of equity jurisdiction for the

enforcement thereof. With respect to the time intervening before suit was brought, as affecting the question of laches, it is apparent that the situation would not be materially different if there had been a much longer delay. The changed conditions causing the increase in value had already occurred, and while the plaintiffs remained inactive so far as this record discloses."

That case was not far different from this as far as the time element was concerned, since The Ohio Oil Company entered upon the land September 21, 1914, and brought in a producing well in October of the same year. The suit was commenced February 13, 1915.

Petitioners cite *Anderson v. Wyoming Development Co.*, 60 Wyo. 417, 154 Pac. 2d, 318, and in that case the Court specifically defines laches as "delay in enforcing one's right which works disadvantage to another." The "disadvantage" to Atlantic in the instant case (a fact not mentioned by petitioners in their brief) is the expenditure of more than $168,000.00 in the development of the lease; an investment which would be entirely lost if petitioners prevail.

Also cited by petitioners is *Forde v. Libby*, 22 Wyo. 464, 143 Pac. 1190, and in that case the Court said:

"and courts of equity have declared one or his privies ought to be estopped and denied the right to repudiate his acts when they have been relied and acted on and when to do so would operate as a fraud or work an injustice."

The "injustice" in the instant case would be the loss of Atlantic's investment.

Petitioners also cite *Vogel v. Shaw*, 42 Wyo. 333, 294 Pac. 687, and therein the Supreme Court of Wyoming quotes with approval from *Faxton v. Faxon*, 28 Mich. 159, as follows:

"There is no rule more necessary to enforce good faith than that which compels a person to abstain

> from enforcing claims which he has induced others to suppose he would not rely on."

In the instant case, Pfister's claim of forfeiture arose at the end of the three year discovery period, August 2, 1948, and he stood by and did nothing, leaving the lease to Cow Gulch in full force and effect, and Atlantic, by his inaction, was induced to take an assignment of the lease and develop the property at great expense.

Another case relied on by petitioners is *Wyoming-Indiana Oil and Gas Co. v. Weston*, 43 Wyo. 526, 7 Pac. 2d, 206, wherein the Court, quoting from another case, said that when a suit is brought within the time fixed by the analogous statute of limitations, the burden is on defendants that extraordinary circumstances exist which require the application of the doctrine of laches in order to secure a just result. The "extraordinary circumstances" here are the development of the property by Atlantic, and a "just result" can be secured only by Atlantic receiving the benefit of its investment and Pfister and his assigns at the same time receiving the 2½% overriding royalty to which they are entitled, and which was awarded to them by the judgment of the lower court.

Petitioners quote portions of Section 818 of Pomeroy's Equity Jurisprudence, 4th Ed., (petitioners' brief, page 14), and we have no quarrel with the enduring soundness of Professor Pomeroy's treatise, but as applied to the facts of this case we like that portion of Section 818 unquoted by petitioners which says:

> "If one maintain silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to remain silent."

A Wyoming case admittedly not in point as to the facts but wholly relevant as to the application of principles of law is *Pryor Mountain Oil and Gas Co. v. Cross*, 31 Wyo. 9, 222 Pac. 570, wherein forfeiture of an oil and gas lease was sought. The Court quoted

from *Thompson v. Christie*, 138 Pa. 230, 20 Atl. 934, as follows:

> " 'The rule undoubtedly is that the right to declare a forfeiture must be distinctly reserved, that the proof of the happening of the event on which the right is to be exercised must be clear, that the party entitled to do so must exercise his right promptly, and that the result of enforcing the forfeiture must not be unconscionable.' "

We submit it would be "unconscionable" in this case to permit Pfister to recover this lease after it has been made valuable by the expenditures of Atlantic.

The principle running through the many cases decided by the courts, wherein relief is denied to litigants seeking to recover oil and gas leases, which have been developed at the expense of another, is commonly referred to as "speculative delay." The rule is succinctly set forth under the heading "Speculative Delay" in Section 220, Page 225 of 21 C.J., and was early announced by this Court in *Twin Lick Oil Co. v. Marbury*, 91 U.S. 587, 23 L. Ed. 328 (decided in 1875), as follows:

> "The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for $1,000 as its fair value, may, by the natural changes of a week or the energy and courage of desperate enterprise, in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event, and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." (P. 331).

The above quotation from the Marbury case is cited and adopted in the opinion of the Supreme Court of Wyoming in Merrill v. Cattle Company, supra, 26

Wyo. 219, 181 Pac. 964. The principle of the Marbury case was followed by this Court in *Johnston v. Standard Mining Co.*, 148 U.S. 360, 37 L. Ed. 480, and in a large number of cases in other courts, including those in the Tenth Circuit Court of Appeals cited in the decision of that Court herein. Nothing can be found in any Wyoming case showing any departure from the rule announced by this Court in the Marbury case. A good statement of the rule, and one which conforms to its application in many other cases, can be found in the opinion of the Tenth Circuit Case, *Winn v. Shugart*, 112 Fed. 2d 617, as follows:

> "The duty to act with dispatch is especially imperative where one claims an interest in property that is highly speculative. One may not withhold his claim to a highly speculative venture, such as was involved in these wildcat oil and gas leases and permits, to await the outcome of an effort to develop them put forth by another, and then when his efforts are crowned with apparent success, come in and claim the fruits thereof. Such a course does not commend itself to a court of equity."

The facts of this case are that Pfister stood by, remained silent and inactive; permitted the records to disclose the existence of the lease to Cow Gulch; did not demand a surrender or assignment; waited hopefully for someone to develop the property, and when Atlantic commenced drilling expressed his satisfaction to his associate, Rundquist, by his letter of July 6, 1949 (R. 161, 162); sought the protection of his contract with Cow Gulch in order that he might obtain the overriding royalty, and during the time when Atlantic was expending $168,000.00 in the drilling of the two wells his only action was to demand the overriding royalty. As a matter of fact he did not at any time ask for an assignment from Cow Gulch or Atlantic prior to the commencement of this suit, because even in the conversation between Snyder and Pace, his representative Snyder demanded other benefits such as $100,000.00 cash, $400,000.00 oil payment and 5% overriding royalty.

Another fact which militates against Pfister's claims now advanced as to the ipso facto or automatic termination of his contract with Cow Gulch, is that in the complaint herein filed a part of the relief prayed for consists of "requiring said defendants to assign said lease to the plaintiff herein." (R. 9).

That estoppel in such cases as this may rest upon silence or inaction, as well as on affirmative conduct, has been declared in a great number of cases and has been recognized by this Court in *Dickerson v. Colgrove*, 100 U.S. 578, 25 L. Ed. 618, from which we quote the following:

> "The estoppel here relied upon is known as an equitable estoppel, or estoppel in pais. The law upon the subject is well settled. The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

And in *Gregg v. Von Phul*, 68 U.S. 274, 17 L .Ed. 536, this Court said:

> "The doctrine of estoppels in pais, or by the act of the party, is founded in natural justice, 'and is a principle of good morals as well as law.' 'The primary ground of the doctrine is, that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted.' (Cases cited). No one is permitted to keep silent when he should speak, and thereby mislead another to his injury."

We do not find in any Wyoming decision a departure from or failure to recognize the legal principles upon which this case was decided, but on the contrary find that they have met express approval in Merrill v. Cattle Company, supra, 26 Wyo. 219, 181 Pac. 964, and

in Pryor Mountain Oil and Gas Co. v. Cross, supra, 31 Wyo. 9, 222 Pac. 570. With specific reference to the question of whether the contractual relationship between Cow Gulch and Pfister was terminated without any act on the part of the latter, we believe the recent Wyoming case of Larsen Sheep Company v. Sjogren, 67 Wyo. 447, 226 Pac. 2d, 177, above cited, is controlling.

While petitioners' argument proceeds on the theory that Atlantic cannot interpose the defenses of estoppel, laches and waiver without a showing of its lack of knowledge, these defenses do not in any way depend upon lack of notice or knowledge, and this is expressly decided in the case of *Tenner v. Carmack*, 297 Ky. 847, 181 S.W. 2d, 455. In that case the Court found that appellants, who made the investment in the lease, purchased with full knowledge, but that appellees, also with full knowledge of the facts, permitted the investment of substantial sums. The Court held that appellees were estopped and the judgment in their favor was reversed.

Petitioners seek to excuse Pfister's failure to take any action to obtain a surrender and assignment of the lease because of his claimed lack of knowledge of his rights. However, his means of knowledge was far superior to that of Atlantic. He was a party to the agreement. It was prepared by his attorney (R. 67). He had Rundquist check the records for him in Lusk in 1947 (R. 55). As early as July, 1948, he knew that a new lease had been issued to Cow Gulch (R. 61), and on July 14, 1949, he and his attorney, Mr. Huey, were in Lusk, Wyoming, saw Rundquist and discussed the lease with him (R. 74).

Pedley, who executed the side agreement for Cow Gulch as president, became physically incapacitated in 1946 and was no longer with the company and Kay, the secretary who signed the document, had died (R. 114-115). There was no copy in the records available to Mr. Kem, the vice president, and he did not know of the existence of the collateral agreement at the

time of his conversation with Pfister in July, 1949, and didn't learn about it until about a month later (R. 115).

It is sought to fasten responsibility upon Atlantic because of claimed constructive notice imparted by the recording of the collateral agreement, while at the same time petitioners seek to excuse Pfister from knowledge of the provisions of the contract, notwithstanding he was a party to it and of course had the same means of access to the public records as Atlantic. While he couldn't find his copy when Rundquist wrote to him in May, he located it quite readily when he was notified the well came in in August (R. 73). Obviously Pfister cannot be excused for his failure to act because of his claimed ignorance of the terms of the contract while seeking to fasten responsibility on Atlantic when the latter's means of knowledge was far inferior to his.

The conclusion reached by the Circuit Court of Appeals that it was unnecessary to determine the question of constructive notice was, in effect, a holding that even if Atlantic had been charged with constructive notice, the decision would have been the same.

Some subsidiary matters invite attention. Petitioners charge concealment by Cow Gulch and Atlantic of their transaction (Petitioners' Brief P. 13), but fail to substantiate their claim by citation of any facts from the Record. The assignment from Cow Gulch to Atlantic was recorded March 24, 1949, and the lease issued to Cow Gulch was recorded April 18, 1949 (R. 180). Recordation of these documents certainly refutes any claimed charge of concealment. Moreover, Pfister knew as early as July, 1948, of the issuance of the new lease to Cow Gulch (R. 61); must have known that production was not obtained within the three year discovery period prior to August 2, 1948, and was promptly notified by his associate, Rundquist, of the commencement of operations by Atlantic (R. 160).

An assumption entirely contrary to fact is made in the footnote on page 5 of Petitioners' Brief to the effect that Atlantic knew or should have known the lease was held by Pfister because of the testimony at page 84 of the Record. Castleberry, representative of Atlantic, did testify (R. 84) that as of March 5, 1948, the lease was held by someone else, but the record discloses it was held by Shell Oil Company and the reassignment from that company to Cow Gulch was not transmitted to the Commissioner of Public Lands of the State of Wyoming until April 12, 1948, so that as of March 5, 1948, the records in the Land Commissioner's office showed ownership of the lease by Shell (Plaintiffs' Exhibit C, R. 159).

On page 6 of Petitioners' Brief it is said Pfister did not have any notice which would indicate that his rights were being invaded until toward the end of May, 1949. If he desired to enforce the waivable option contained in the side agreement, the first "invasion" of his rights occurred as early as August 2, 1948, when the three years expired without discovery. Prior to that time, he knew of the issuance of the new lease to Cow Gulch and must have known there was no discovery. And while petitioners urge that Atlantic had constructive notice from the defectively recorded side agreement, they fail to acknowledge the notice to Pfister arising from the recording of the lease to Cow Gulch, April 18, 1949, and the assignment thereof by Cow Gulch to Atlantic, March 24, 1949 (R. 180).

While decided upon other principles, we believe the Circuit Court could have rested its decision upon the doctrine of substantial performance, a rule of law recognized in Wyoming as will be seen from the decision in *Lusk Lumber Co. v. Independent Producers*, 35 Wyo. 381, 249 Pac. 790. Pfister received $1,000.00 for the assignment to Cow Gulch (R. 11), and gave his assignee three years within which to make discovery. Actual production was obtained August 8, 1949 (R. 139), little more than a year after the discovery period. There is no evidence of any loss occurring to Pfister by reason of the delayed discovery. What-

ever oil is in the ground remains, and Pfister and his assigns will receive the same 2½% overriding royalty. While Pfister stood by, the contract was performed, and under the doctrine of substantial performance he is entitled to no relief unless it be damages for delay in performance, and we submit there are none, and in any event no claim is made therefor.

The Decision Did Not Violate the Wyoming Statutes

Petitioners advance the argument that Pfister's assignment to Cow Gulch and the side agreement comprise a sub-lease; that this is an "unless" type lease which expired ipso facto on August 2, 1948; and that since it so expired there was no written contract between Pfister and Cow Gulch or between Pfister and Atlantic, and the judgment of the trial court created the relationship of landlord and tenant by implication or operation of law, in violation of the provisions of Section 66-219 and Section 66-220, Wyoming Compiled Statutes, 1945, referred to at page 19 of petitioners' brief.

It is provided in paragraph 7 of the side agreement (R. 10-12) that after expiration of the term of the original lease Pfister or Cow Gulch might secure a renewal, and if such renewal is acquired by Cow Gulch, the holder thereof shall assign to Pfister the same overriding royalty as was reserved by Pfister in the assignment of the original lease, and if acquired by Pfister, then he should assign the lease to Cow Gulch, reserving the same overriding royalty. From such provision it appears that after expiration of the original lease issued to Pfister and by him assigned to Cow Gulch, either Pfister or Cow Gulch might secure a renewal from the State of Wyoming. The original lease did expire and Cow Gulch obtained the renewal. Under the express provisions of the agreement, there was then no obligation upon Cow Gulch to assign the new lease to Pfister but only to assign him the overriding royalty of 2½%. Had Pfister acquired the new

lease, he would have been obligated to assign to Cow Gulch, reserving the same overriding royalty.

Pfister was not the lessee in the new lease issued May 2, 1948, and it was never assigned to him, and he never held title thereto. Therefore, he was never lessor, assignor or sub-lessor as to such lease.

In unmistakable clarity it was the contract of Pfister and Cow Gulch that the latter had a right to obtain a new lease, and if same was procured was not obligated to assign it to Pfister. Such being the factual situation, no basis can exist for any claim that Atlantic is a sub-lessee of Pfister or that any such relationship was created by the judgment in the case. The Court by its judgment affirmed the existence of the lease and its ownership by Atlantic. This did not create any relationship of landlord and tenant between Pfister and Atlantic but merely confirmed an existing relationship of landlord and tenant between the State of Wyoming and Atlantic, who had succeeded to the rights of Cow Gulch, the lessee, by assignment.

The argument of petitioners proceeds on the theory of ipso facto termination, a theory wholly untenable under the decision of the Supreme Court of Wyoming in Larsen Sheep Company v. Sjogren, 67 Wyo. 447, 226 Pac. 2d, 177, where under language far more compelling than that employed in the collateral agreement, the Supreme Court of Wyoming held there was no ipso facto termination, and we say that the judgment of the lower courts on this point is fully supported by this Wyoming decision.

CONCLUSION

We are convinced the judgment and decision of the lower courts are not in conflict with applicable local decisions or contrary to the cited Wyoming statutes. On the contrary, they are in complete harmony with and completely supported by the Wyoming cases of Merrill v. Cattle Company and Larsen v. Sjogren, supra.

Additionally, we may point out that this Court, in *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 68 L. Ed. 413, cited in the text of paragraph 2 of Rule 38, said:

> "Heretofore we have pointed out the necessity for clear, definite and complete disclosures concerning the controversy when applying for certiorari."

We think petitioners have failed in this respect.

Also the questions involved are merely those of personal right between the parties and not of general importance. In *Fields v. United States*, 205 U.S. 292, 51 L. Ed. 807, this Court said:

> "However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of state and federal courts, or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public."

And in *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 67 L. Ed. 712, also cited in paragraph 2 of Rule 38, we find the following:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it it is very important that we be consistent in not granting a writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."

Under established principles of long standing, this is not the type of case to invoke the jurisdiction of this Court.

Counsel for petitioners greatly magnifies the importance of this law suit in hitching his argument to the loss of the Iranian oil fields (Petitioners' Brief P. 26). Union obtained a dry hole on this lease in 1923 (R. 123), and the Nelson and Shell wells drilled in the immediate vicinity since 1941 (R. 59, 60, 122) were dry, and Atlantic drilled the Roth No. 1 in Section 25 immediately to the north and the Joss well immediately to the south, and both were dry (R. 140, 141). We doubt that production from this lease will have any impact in alleviating the shortage arising from the unfortunate troubles in Iran. We know oil can be produced only by the expenditure of vast sums of money, and that to insure development the investments represented thereby should be protected. Pfister held the original lease a little more than seven years before he assigned to Cow Gulch, and never drilled the land himself or obtained any production therefrom. While we do not suggest the invasion of anyone's rights, being fully convinced that Pfister has received from the judgment of the Court all that he bargained for, to-wit: the royalty of 2½%, we are convinced that the argument of counsel for petitioners misfires in suggesting the destruction of the capital invested by Atlantic, when such capital investment is so urgently needed in the production of oil.

The petition should be denied.

Respectfully submitted,

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